Danny Tan Yew Chong v Skyboard Media Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-255–07 OF 2017
KHADIJAH IDRIS JC
30 APRIL 2018

Bankruptcy — Validity of transactions — Avoidance of voluntary settlement — Whether transfer of shares void against Director General of Insolvency — Bankruptcy Act 1967

Civil Procedure — Striking out — Application for — Whether defendants entitled to strike out plaintiff's application — Preliminary objection — Whether second defendant entitled to affirm affidavits on behalf of all defendants — Rules of Court 2012 O 18 r 19

Companies and Corporations — Member's rights — Oppression — Oppressive proceedings against defendants — Whether oppressive conduct committed by defendants — Whether defendants deprived status of plaintiff — Whether plaintiff had locus to commence oppressive action — Whether plaintiff's action against defendants under s 346 of the Companies Act 2016 unsustainable — Companies Act 2016 s 346

The present Originating Summons No 24NCC-255-07 of 2017 ('the originating summon') was filed by the plaintiff pursuant to s 346 of the Companies Act 2016 ('CA 2016') alleging oppressive conduct on the part of the first to the fifth defendants. By court order dated 28 August 2017 the originating summon was amended where the sixth defendant was added ('the amended originating summon'). The fifth defendant filed an application ('encl 10') to strike out the amended originating summon under O 18 r 19(1)(b) or (1)(c) or (1)(d) of the Rules of Court 2012 ('the ROC 2012'). This was followed by the first to the fourth defendants' application ('encl 14') to strike out the amended originating summon under O 18 r 19(1)(a) and alternatively O 18 r 19(1)(b), (1)(c) or (1)(d) of the ROC 2012. On the plaintiff's part, an application for injunction ('encl 31') was filed seeking for an order to restrain the first to the sixth defendants from dealing with or disposing the 50,000 shares registered in the sixth defendant's name, which the plaintiff alleged were beneficially owned by the plaintiff. Besides the striking out applications, the first to the fourth defendant and the fifth defendant had also filed applications ('encls 15 and 24 respectively') for an order that the undertaking given by the plaintiff in his application for injunction be fortified

in the sum to be determined by the court. The plaintiff, Danny Tan Yew Chong, was appointed director of the first defendant company, Skyboard Media Sdn Bhd ('the first defendant') on 29 October 2014. The first defendant was incorporated on or about 3 May 2010 as a private limited company. The principal business of the first defendant was outdoor billboard advertising. The first defendant had an issued and paid up capital of RM2 which was divided into two shares. One Tan Chee Kuang ('TCK') and the second defendant each held one share. In the plaintiff's affidavit, he stated that the first defendant was founded by his father, TCK and the second defendant. TCK and the second defendant were the original subscriber of the first defendant. Both TCK and the second defendant held 50,000 shares each. The second defendant was the general manager of the first defendant and ran and managed the day-to-day affairs of the first defendant. TCK was adjudged a bankrupt on 22 May 2012. As a result of the adjudication, the plaintiff was appointed as director of the first defendant with effect from 29 October 2014 and acted as TCK's nominee in managing the business of the first defendant in Johor. To include the participation of Bumiputra in the first defendant, the second defendant and TCK transferred 70,000 of their collective shares to the fifth defendant where the fifth defendant held in trust 20,000 shares for the benefit of the second defendant and 50,000 shares for the benefit of TCK. When TCK was adjudged a bankrupt on 22 May 2012, the plaintiff became the beneficial owner of the 50,000 shares which was held by the fifth defendant on trust for the benefit of the plaintiff from the documents executed between the plaintiff and the fifth defendant, namely, the irrevocable power of attorney, the declaration of trust and the deed of trust all dated 4 September 2016 executed ('the trust documents'). The plaintiff challenged the second defendant's legal capacity to affirm affidavits on behalf of the first, third and fourth defendants. This was because there was no proof of the first defendant's resolution authorising the second defendant to affirm affidavits on behalf of the first defendant. Neither was there any affidavit filed by the third and fourth defendant affirming that they had authorised the second defendant to affirm affidavits on their behalf.

Held, allowing encls 10 and 14 and striking out encls 15, 24 and 31:

(1) It was trite law that only in plain and obvious cases can the court exercise its power to strike out a case under any of the four limbs of O 18 r 19 of the ROC 2012 and therefore such power should be exercised sparingly. It was for the first to the fifth defendants to prove that their application came within any of the four limbs of O 18 r 19 of the ROC 2012 (see paras 27–28).

(2) The court was satisfied that the second defendant was fully and duly authorised to affirm the affidavits for and on behalf of the first, third and fourth defendants. Close scrutiny of the first to the fourth defendants' affidavits showed that the second defendant averred that he was duly authorised by the first, third and fourth defendants to affirm the affidavits

on their behalves. The second defendant also averred that the facts deposed in the affidavit were within his personal knowledge derived from the records of the first to the fourth defendants to which he had access. The second defendant had specifically identified the plaintiff's affidavits which he was duly authorised by the first, third and fourth defendants to reply as stated at para 3 of encl 16, para 3 of encl 17 and para 3 of encl 45. In the first to the fourth defendants' affidavit encl 16, the second defendant had specifically stated the authorisation given by the first, third and fourth defendants to him to affirm the affidavit to oppose the originating summon and to reply to the plaintiff's affidavit in support of the originating summon. In the first to the fourth defendants' affidavit encl 20, the second defendant had specifically stated the authorisation given by the first, third and fourth defendants to him to affirm the affidavit to support the first to the fourth defendants' application for fortification in encl 5. The fact that the second defendant was one of the two first directors of the first defendant from its inception in 2010 and was still one of the present director of the first defendant explained the justification for the first, third and fourth defendants' decision to authorise the second defendant to affirm the affidavits for and on behalf of them in this proceedings. Under the circumstances, it would be for the first, third and fourth defendant to question the second defendant's authority or lack of it and not the plaintiff (see paras 29–33).

(3) Having considered the case of *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 ('*Owen Sim Liang Khui*'s case'), the court held that it was not open for the plaintiff to rely on that case to support his action against the defendants. The complainant in *Owen Sim Liang Khui*'s case was at all material time a registered shareholder of the company. In the instant case the plaintiff admitted that he was never registered as a shareholder of the first defendant. Since the plaintiff was never registered as a shareholder of the first defendant company, there was simply no issue of the first to the fifth defendants depriving the plaintiff of his status as a member of the first defendant. The plaintiff's ownership over the TCK's shares was vigorously challenged and it inevitably brought about the issue of locus standi of the plaintiff (see paras 39–42).

(4) Based on the affidavits evidence adduced, it could be reasonably inferred that the transfer of TCK's one shares was not done in good faith. It was done to circumvent s 52 of the Insolvency Act 1967 so that in the event TCK was adjudged bankrupt, TCK's shares would not be passed to the Director General of Insolvency ('DGI') who was empowered to receive, manage and realise TCK's assets for the benefit of TCK's creditors. As the transfer was void against the DGI, the agreement between TCK and Mohd Sunawan for Mohd Sunawan to hold the one shares in trust for the benefit of TCK was void. Therefore Mohd Sunawan did not possess the legal capacity and good title to deal with the one share. Accordingly

Mohd Sunawan did not has good title over the TCK's shares to transfer it to the fifth defendant which he subsequently held on trust for TCK including transferring the shares which he held on trust for TCK to others. Since TCK's properties were vested with the DGI upon him being adjudged a bankrupt, TCK had no title and right over the TCK's shares in the first defendant. He had no legal capacity to transfer the TCK's shares to Mohd Sunawan in 2013. As TKC had no good title over the 50,000 shares to pass to Mohd Sunawan, the dealings or transactions carried out in respect of the TCK's shares by TCK and the transactions thereafter was of no effect, null and void. As such the plaintiff could not rely on the trust documents to acquire beneficiary title or ownership over the TCK's shares in the first defendant so as to enable him to initiate this oppressive proceedings under s 346 of the CA 2016. To allow the plaintiff to assert ownership over the TCK's shares would tantamount to lending a hand to the plaintiff to violate and defeat the Insolvency Act 1965 which was simply against public policy (see paras 48–56).

[Bahasa Malaysia summary

Saman Pemula No 24NCC-255–07 Tahun 2017 ini ('saman pemula') telah difailkan oleh plaintif menurut s 346 Akta Syarikat 2016 ('AS 2016') yang mendakwa kelakuan penindasan di pihak defendan pertama hingga kelima. Dengan perintah mahkamah bertarikh 28 Ogos 2017 saman pemula telah dipinda di mana defendan keenam telah ditambah ('saman pemula yang dipinda'). Defendan kelima memfailkan permohonan ('lampiran 10') untuk membatalkan saman pemula yang dipinda di bawah A 18 k 19(1)(b) atau (1)(c) atau (1)(d) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Ini diikuti oleh permohonan defendan pertam hingga keempat ('lampiran 14') untuk membatalkan saman pemula yang dipinda di bawah A 18 k 19(1)(a) dan sebagai alternatif A 18 k 19(1)(b), (1)(c) atau (1)(d) KKM 2012. Mengenai pihak plaintif, permohonan untuk injunksi ('lampiran 31') difailkan untuk mendapatkan perintah untuk menghalang defendan yang pertama kepada keenam daripada berurusan dengan atau melupuskan 50,000 saham yang didaftarkan dalam nama defendan keenam, yang mana plaintif mendakwa secara benefisial dimiliki oleh plaintif. Selain daripada permohonan pembatalan, defendan pertama hinggan keempat dan defendan kelima juga telah memfailkan permohonan ('lampiran 15 dan 24 masing-masing') untuk satu perintah bahawa akujanji yang diberikan oleh plaintif dalam permohonannya untuk injunksi diperkukuhkan dalam jumlah untuk ditentukan oleh mahkamah. Plaintif, Danny Tan Yew Chong, dilantik sebagai pengarah syarikat defendan pertama, Skyboard Media Sdn Bhd ('defendan pertama') pada 29 Oktober 2014. Defendan pertama diperbadankan pada atau sekitar 3 Mei 2010 sebagai sebuah syarikat sendirian berhad. Perniagaan utama defendan pertama ialah pengiklanan papan iklan luar. Defendan pertama mempunyai modal terbitan dan berbayar sebanyak RM2 yang dibahagikan kepada dua saham. Satu Tan Chee Kuang ('TCK') dan kedua defendan

masing-masing memegang satu saham. Dalam afidavit plaintif, beliau menyatakan bahawa defendan pertama ditubuhkan oleh bapanya, TCK dan defendan kedua. TCK dan defendan kedua adalah pelanggan asal defendan pertama. Kedua-dua TCK dan defendan kedua memegang 50,000 saham masing-masing. Defendan kedua adalah pengurus besar defendan pertama dan mengurus urusan harian defendan pertama. TCK telah diputuskan bankrap pada 22 Mei 2012. Hasil daripada keputusan itu, plaintif telah dilantik sebagai pengarah defendan pertama berkuatkuasa pada 29 Oktober 2014 dan bertindak sebagai penama TCK dalam menguruskan perniagaan defendan pertama di Johor. Untuk memasukkan penyertaan Bumiputra dalam defendan pertama, defendan kedua dan TCK memindahkan 70,000 saham kolektif mereka kepada defendan kelima di mana defendan kelima memegang 20,000 amanah saham untuk faedah defendan kedua dan 50,000 saham untuk faedah TCK. Apabila TCK telah diputuskan bankrap pada 22 Mei 2012, plaintif menjadi pemilik benefisial 50,000 saham yang dipegang oleh defendan kelima atas amanah untuk faedah plaintif daripada dokumen-dokumen yang dilaksanakan antara plaintif dan defendan kelima, iaitu, surat kuasa wakil tidak boleh batal, deklarasi amanah dan surat ikatan amanah semua dilaksanakan bertarikh 4 September 2016 ('dokumen amanah'). Plaintif mencabar keupayaan undang-undang defendan kedua untuk mengesahkan afidavit bagi pihak defendan pertama, ketiga dan keempat. Ini kerana tidak ada bukti mengenai ketetapan defendan pertama yang memberi kuasa kepada defendan kedua untuk mengesahkan afidavit bagi pihak defendan pertama. Tiada afidavit yang difailkan oleh defendan ketiga dan keempat yang mengesahkan bahawa mereka telah membenarkan defendan kedua untuk mengesahkan afidavit bagi pihak mereka.

Diputuskan, membenarkan lampiran 10 dan 14 dan membatalkan lampiran 15, 24 dan 31:

(1) Adalah undang-undang mantap bahawa hanya dalam kes-kes yang jelas dan nyata yang membolehkan mahkamah menjalankan kuasa untuk membatalkan satu kes di bawah mana-mana empat situasi A 18 k 19 KKM 2012 dan oleh itu kuasa tersebut sepatutnya dilaksanakan dengan berhati-hati. Ia adalah untuk defendan pertama hingga kelima untuk membuktikan bahawa permohonan mereka datang dalam mana-mana empat situasi A 18 k 19 KKM 2012 (lihat perenggan 27–28).

(2) Mahkamah berpuas hati bahawa defendan kedua adalah sepenuhnya dan diberi kuasa sepenuhnya untuk mengesahkan afidavit untuk dan bagi pihak defendan pertama, ketiga dan keempat. Pengawasan rapat terhadap afidavit defendan pertama hingga keempat menunjukkan bahawa defendan kedua menegaskan bahawa dia telah diberi kuasa oleh defendan pertama, ketiga dan keempat untuk mengesahkan affidavit bagi pihak mereka. Defendan kedua juga menegaskan bahawa fakta-fakta yang digariskan dalam afidavit tersebut adalah dalam

pengetahuan pribadinya yang diperoleh daripada rekod defendan pertama hingga keempat yang mana dia mempunyai akses. Defendan kedua secara khusus telah mengenal pasti affidavit plaintif yang dia telah diberi kuasa oleh defendan pertama, ketiga dan keempat untuk membalas seperti yang dinyatakan di perenggan 3 lampiran 16, perenggan 3 lampiran 17 dan perenggan 3 lampiran 45. Di dalam afidavit lampiran 16 defendan pertama hingga keempat, defendan kedua telah menyatakan secara khusus kebenaran diberikan oleh defendan pertama, ketiga dan keempat kepadanya untuk mengesahkan afidavit untuk menentang saman pemula dan menjawab afidavit sokongan saman pemula plaintif. Di dalam afidavit lampiran 20 defendan pertama hingga keempat, defendan kedua telah menyatakan secara khusus kebenaran diberikan oleh defendan pertama, ketiga dan keempat kepadanya untuk mengesahkan afidavit untuk mengesahkan afidavit untuk menyokong permohonan pembentangan dalam lampiran 5 defendan pertama hingga keempat. Hakikat bahawa defendan kedua adalah salah satu daripada dua pengarah pertama defendan pertama sejak penubuhannya pada tahun 2010 dan masih merupakan salah satu pengarah sekarang defendan pertama menjelaskan justifikasi untuk keputusan defendan pertama, ketiga dan keempat untuk membenarkan defendan kedua untuk mengesahkan afidavit untuk dan bagi pihak mereka dalam prosiding ini. Di bawah keadaan ini, adalah untuk defendan pertama, ketiga dan keempat untuk mempersoalkan kuasa defendan kedua atau kekurangannya dan bukan plaintif (lihat perenggan 29–33).

(3) Setelah mempertimbangkan kes *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 ('kes *Owen Sim Liang Khui*'), mahkamah memutuskan bahawa tidak terbuka buat plaintif untuk bergantung kepada kes itu untuk menyokong tindakannya terhadap defendan. Pengadu dalam kes *Owen Sim Liang Khui* adalah pada masa yang material seorang pemegang saham berdaftar syarikat. Dalam kes ini, plaintif mengakui bahawa dia tidak pernah didaftarkan sebagai pemegang saham defendan pertama. Oleh kerana plaintif tidak pernah didaftarkan sebagai pemegang saham syarikat defendan pertama, tiada isu defendan pertama hingga kelima yang menafikan plaintif statusnya sebagai ahli defendan pertama. Pemilikan plaintif ke atas saham TCK telah dicabar dengan bersungguh-sungguh dan tidak dapat dielakkan membawa isu locus standi plaintif (lihat perenggan 39–42).

(4) Berdasarkan keterangan afidavit yang dikemukakan, dapat disimpulkan bahawa pemindahan saham TCK tidak dilakukan dengan niat baik. Ia telah dilakukan untuk mengelak s 52 Akta Insolvensi 1967 supaya jika TCK diputuskan bankrap, saham TCK tidak akan dipindahkan kepada Ketua Pengarah Insolvensi ('KPI') yang diberi kuasa untuk menerima, mengurus dan melaksanakan aset TCK untuk faedah pemiutang TCK.

Memandangkan pemindahan itu tidak sah terhadap KPI, perjanjian antara TCK dan Mohd Sunawan untuk Mohd Sunawan memegang satu saham dalam amanah untuk faedah TCK adalah tidak sah. Oleh itu, Mohd Sunawan tidak memiliki keupayaan undang-undang dan hakmilik untuk menjalankan satu saham. Oleh itu, Mohd Sunawan tidak mempunyai hakmilik ke atas saham-saham TCK untuk memindahkannya kepada defendan kelima yang dia kemudiannya memegang atas amanah untuk TCK termasuk memindahkan saham yang dia pegang untuk amanah bagi TCK kepada orang lain. Oleh kerana harta TCK telah diletakkan kepada KPI apabila diputuskan bankrap, TCK tidak mempunyai hakmilik dan hak atas saham TCK dalam defendan pertama. Dia tidak mempunyai keupayaan undang-undang untuk memindahkan saham TCK kepada Mohd Sunawan pada 2013. Memandangkan TKC tidak mempunyai hak ke atas 50,000 saham untuk diserahkan kepada Mohd Sunawan, urusan atau transaksi yang dilakukan berkenaan dengan saham TCK oleh TCK dan transaksi selepas itu tidak berkuat kuasa, tidak sah dan batal. Oleh itu, plaintif tidak boleh bergantung kepada dokumen amanah untuk memperoleh hak milik benefisiari atau pemilikan ke atas saham-saham TCK dalam defendan pertama untuk membolehkannya memulakan prosiding penindasan ini di bawah s 346 AS 2016. Untuk membenarkan plaintif untuk mengesahkan pemilikan ke atas saham-saham TCK akan sama seperti memberi pinjaman kepada plaintif untuk melanggar dan mengalahkan Akta Insolvensi 1965 yang hanya menentang dasar awam (lihat perenggan 48–56).]

Notes

For cases on application for striking out, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9281–9311.

For cases on oppression, see 3(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 698–765.

For cases on validity of transactions in general, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4120–4121.

Cases referred to

Bandar Builders Sdn Bhd 2 Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ 192, CA (refd)

Md Hilmi bin Md Noor & Anor (suing in their personal capacities and as administrators for the deceased, Md Noor bin Mohamed) v Azman bin Ahmad & Ors [2016] 6 MLJ 205; [2016] 6 MLRA 39, CA (refd)

Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd [2003] 6 MLJ 311, HC (refd)

Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113; [1996] 4 CLJ 716, FC (distd)

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah Sdn Bhd) & Ors [1996] 1 MLJ 309, CA (refd)

Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd [2016] 5 MLJ 1; [2016] 7 CLJ 823, FC (refd)

Solai Realty Sdn Bhd v United Overseas Bank (M) Bhd [2013] 4 MLJ 545, CA (refd)

Tong Soon Tiong & Ors v FA Securities Sdn Bhd [2016] 6 MLJevi 165; [2013] 2 CLJ 448, FC (refd)

VVO Construction Sdn Bhd v Bina MYK Sdn Bhd and another case [2017] MLJU 79, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) s 293
Companies Act 2016 ss 2, 346, 432
Contracts Act 1950 s 24(e)
Insolvency Act 1967 ss 8, 24, 38, 52, 58
Rules of Court 2012 O 18 r 19, O 18 r 19(1)(b), (1)(c), (1)(d), O 28 r 8

T Gunaseelan (G Nadesh and Sheril Aishah with him) (Malek Paulian & Gan) for the plaintiff.
Wilson Ho (Bryan Ho with him) (Ho Partnership) for the first, second, third and fourth defendants.
Sakthy Vell Saminathan (Sakthy Vell) for the fifth and sixth defendants.

Khadijah Idris JC:

INTRODUCTION

[1] This Originating Summons No 24NCC-255–07/2017 ('OS') is filed by the plaintiff pursuant to s 346 of the Companies Act 2016 ('the CA 2016') alleging oppressive conduct on the part of the first to the fifth defendants. By court order dated 28 August 2017 the OS was amended where the sixth defendant was added ('amended OS').

[2] The fifth defendant filed an application (encl 10) to strike out the amended OS under O 18 r 19(1)(b) or (1)(c) or (1)(d) of the Rules of Court 2012 ('the RoC 2012').

[3] This is followed by the first to the fourth defendants' application (encl 14) to strike out the amended OS under O 18 r 19(1)(a) and/or alternatively O 18 r 19(1)(b), (1)(c) or (1)(d) of the RoC 2012.

[4] On the plaintiff's part, an application for injunction (encl 31) was filed,

seeking among others, for an order to restrain the first to the sixth defendants from dealing with or disposing the 50,000 shares registered in the sixth defendant's name, which the plaintiff alleged are beneficially owned by the plaintiff.

[5] Besides the striking out applications, the first to the fourth defendant and the fifth defendant had also filed applications (encls 15 and 24 respectively) for an order that the undertaking given by the plaintiff in his application for injunction be fortified in the sum to be determined by the court.

[6] I allowed both encls 10 and 14 for the amended OS to be strike out against the first to the fifth defendants. I also ordered the 50,000 shares in the first defendant which is held by the sixth defendant to be transferred to the Director General of Insolvency. Consequential to the striking out of the amended OS, I accordingly strike out encls 31, 15 and 24.

[7] Dissatisfied with the striking out of the amended OS and the consequential orders, the plaintiff appealed.

THE ORIGINATING SUMMON

[8] Via the amended OS the plaintiff seeks, inter alia, for the following reliefs:

(a) a declaration that the second to the fifth defendants:

  (i) are conducting the affairs of the first defendant and/or exercising their powers as directors of the first defendant in a manner oppressive, discriminatory and/or prejudicial to the plaintiff, and/or in disregard of the interests of the plaintiff; or

  (ii) have procured and/or caused to be done and/or are threatening to procure and/or cause to be done acts of the first defendant which have and/or will unfairly discriminate against or which is and/or will be otherwise prejudicial to the plaintiff;

(b) an order that the defendants, whether by themselves, their servants, agents, representatives, or otherwise, be restrained from conducting the affairs of the first defendant in a manner that is oppressive, discriminatory and/or prejudicial to the plaintiff, and/or in disregard to the interest of the plaintiff;

(c) an order that the defendants, whether by themselves, their servants, agents, representatives, or otherwise, do provide access to the plaintiff to the financial documents and business records and information of the first defendant requested by the plaintiff;

(d) an order that the first defendant (provide for the reduction of capital of the company accordingly) or second defendant and/or third defendant and/or fourth defendant and/or fifth defendant and/or the sixth defendant do purchase all shares held by the plaintiff for the total sum of RM1,400,000;

(e) alternative to prayer (d) above, the first defendant be wound up pursuant to s 432 of the Companies Act 2016;

(f) a declaration that the appointment of the third and fourth defendants as directors of the first defendant and removal of the fifth defendant, if any, is unlawful;

(g) an injunction restraining the second to the fifth defendants from exercising powers as directors or managing directors of the first defendant save to fulfil their statutory obligations;

(h) a declaration that the issuance of 87,500 new shares in the first defendant is unlawful and is thereby cancelled;

(i) an injunction restraining the second to the sixth defendants from in any way altering the shareholding and directorships in the first defendant;

(j) a declaration that the transfers of 20,000 beneficial shares from the fifth defendant to the second and third defendants in equal shares, if any, is unlawful;

(k) a declaration that by virtue of trust, the plaintiff is the beneficial owner of the 50,000 shares held by the fifth defendant;

(l) a declaration that the transfers of the plaintiff's 50,000 beneficial shares from the fifth defendant to the sixth defendant, is unlawful;

(m) as a consequence, that the first defendant registers the plaintiff as a shareholder of 50,000 shares in the first defendant;

(n) an injunction restraining the second to the fifth defendants, whether by themselves, their servants and/or agents or otherwise from howsoever dealing with or disposing of the assets of the first defendant;

(o) an order that the second to the sixth defendants be restrained from using any of the assets of the first defendant to defend this suit brought against them and to reimburse the first defendant for the assets already used to defend this suit, if any;

(p) costs of the proceedings be borne by the second to sixth defendants on a full indemnity basis; and

(q) any further or other relief as this honourable court deems fit.

[9] Based on the plaintiff's affidavit, the acts of oppression as alleged by the plaintiff are as follows:

(a) disagreement between the second defendant, TCK and the plaintiff arose in relation to the way the second defendant manages the affairs of the first defendant. The second defendant had attempted to exclude the plaintiff from discharging his duty as a director and shareholder of the first defendant and that the second defendant's lack of transparency in managing the first defendant including its financial and commercial matters;

(b) around March 2016 the plaintiff and the second defendant commenced negotiations for the second defendant to buy the plaintiff out of the first defendant for a total consideration of RM1,400,000. However there were no agreement finalised because the second defendant constantly changes his position in respect of the purchase consideration of the plaintiff's shares, namely from RM1,400,000 to RM250,000 and finally to RM8,000 with the assignments of advertisement boards belonging to the first defendant. The changes in the second defendant's position is due to the second defendant's lack of fund and/or ill intention to kick the plaintiff out of the first defendant by putting pressure on the plaintiff to accept a low purchase consideration;

(c) the second defendant called for a meeting of the board of directors of the first defendant to be held on 21 October 2016 without notice or proper notice to the plaintiff, contrary to article 79 of the articles of association of the first defendant;

(d) the second defendant held board of directors' meeting on 21 October 2016 without the presence of the plaintiff. At the said meeting the third and fourth defendants were appointed as director of the first defendant without the plaintiff's knowledge;

(e) the second defendant transferred his 20,000 shares held in trust by the fifth defendant to himself and the third defendant in equal shares, without notice or proper notice to the plaintiff;

(f) as at 20 June 2017, the fifth defendant is no longer a director of the first defendant. The capital of the first defendant has been altered by the issuance of 87,500 new shares in favour of the second defendant with the intention to diminish the plaintiff's 50% beneficial shareholding in the first defendant. It is the plaintiff's contentions that all the acts above were done by the second defendant with the assistance of the third to the fifth defendants to ensure continuity of his control of the company and to effectively push me out of the company;

(g) the plaintiff's request for information (such as the first defendant management and/or financial accounts of the first defendant) from the

second defendant and the first defendant secretaries has been met with resistance and/or silence on the part of the defendants;

(h) the second defendant refused to pay to the suppliers of the first defendant in Johor (managed by the plaintiff) for services rendered for the maintenance of the billboards. This according to the plaintiff is to apply pressure to remove the plaintiff from the first defendant;

(i) the plaintiff's effort to transfer the 50,000 beneficial shares to himself was met with resistance from the fifth defendant. The fifth defendant has changed his position to state that the plaintiff's 50,000 beneficial shares were never held by the fifth defendant as trustee for the plaintiff. According to the plaintiff this is a blatant lie as the fifth defendant had previously acknowledged that the fifth defendant was indeed holding the 50,000 shares for the plaintiff's benefit;

(j) the plaintiff has not been paid his salaries as director for the month July and August 2016 and also the plaintiff's claim for the month May to August 2016 for a total sum of RM21,913.30. This is another attempt on the part of the defendant to oust the plaintiff out of the first defendant;

(k) the plaintiff was unlawfully removed as director of the first defendant at the extraordinary general meeting (EGM) held on 28 March 2017 where the second to the fifth defendants removed the plaintiff as director. The plaintiff was not notified of the (EGM); and

(l) the plaintiff was given an option either to purchase the first defendant's car or return it.

BACKGROUND FACTS

[10] The plaintiff, Danny Tan Yew Chong, was appointed director of the first defendant company, Skyboard Media Sdn Bhd (the first defendant) on 29 October 2014.

[11] The first defendant was incorporated on or about 3 May 2010 as a private limited company. The principal business of the first defendant is outdoor billboard advertising. It owns several/numerous advertising billboards all over Malaysia and rents advertising space therein to other entities. The first defendant had an issued and paid up capital of RM2 which was divided into two shares. One Tan Chee Kuang (TCK) and the second defendant each held one share.

[12] Based on the information from the Companies Commission of Malaysia (exh DT1 of the plaintiff's affidavit encl 2), as at 7 April 2017 the total authorised share capital of the first defendant is 500,000 and the total issued share capital is 100,000 ordinary shares of RM1 each. The shareholders

and shareholding structure of the first defendant as at 7 April 2017 is as follows:

(a) the second defendant holds 30,000 shares; and

(b) the fifth defendant holds 70,000.

[13] The members of the Board of Directors of the first defendant as at 7 April 2017 consists of the second to the fifth defendants.

[14] The facts stated below are gathered from the various affidavits filed by the parties.

[15] In his affidavits, the plaintiff states as follows:

(a) the first defendant was founded by his father Tan Chee Kuang ('TCK') and the second defendant. TCK and the second defendant were the original subscriber of the first defendant. Both TCK and the second defendant held 50,000 shares each;

(b) the second defendant was the general manager/director of the first defendant and ran and managed the day to day affairs of the first defendant;

(c) TCK was adjudged a bankrupt on 22 May 2012. As a result of the adjudication, the plaintiff was appointed as director of the first defendant with effect from 29 October 2014 and acted as TCK's nominee in managing the business of the first defendant in Johor;

(d) to include the participation of Bumiputra in the first defendant, the second defendant and TCK transferred 70,000 of their collective shares to the fifth defendant where the fifth defendant held in trust 20,000 shares for the benefit of the second defendant and 50,000 shares for the benefit of TCK; and

(e) when TCK was adjudged a bankrupt on 22 May 2012, the plaintiff became the beneficial owner of the 50,000 shares which was held by the fifth defendant on trust for the benefit of the plaintiff. This is evident from the documents executed between the plaintiff and the fifth defendant, namely, the irrevocable power of attorney, the declaration of trust and the deed of trust all dated 4 September 2016 executed (exh DT5 encl 2). These documents are hereinafter collectively referred to as the 'trust documents'.

[16] The facts as related by the first to the fourth defendants are as follows:

A (a) the first defendant was incorporated on 3 May 2010 with an issued and paid up capital of RM2. The second defendant and TCK each held one share in the first defendant and they were the first directors of the first defendant;

B (b) on or around 2009, TCK was faced with legal proceedings in respect of non-payment of a sum amounting to RM367,853.02 (suit against TCK). Subsequently judgment was entered against TCK on 10 May 2011 (judgment against TCK). Eventually TCK was adjudged a bankrupt on 15 August 2012;

C (c) however before TCK was adjudged bankrupt but after the suit against TCK was filed and before judgment against TCK, on 26 January 2011 TCK had transferred his one share in the first defendant to one Mohd Sunawan bin Hj Md Som ('Mohd Sunawan') who is to hold the shares on trust for TCK. On the same day TCK resigned as director and Mohd Sunawan was appointed as director of the first defendant;

D (d) for purpose of increasing Bumiputra participation in the first defendant, the authorised share capital of the first defendant was increased from 100,000 to 500,000 on 3 May 2011. Out of the 500,000 shares, 98,998 shares of RM1 each were issued where 49,999 ordinary shares of RM1 each were issued each to the second defendant and Mohd Sunawan. Mohd Sunawan holds the 50,000 shares (TCK's shares) on trust for TCK. Thus both the second defendant and Mohd Sunawan held 50,000 shares each in the first defendant company;

E (e) on 10 May 2011, judgment against TCK was entered in relation to the suit against TCK;

F (f) on 1 November 2011 the second defendant transferred 20,000 of his ordinary shares in the first defendant to Mohd Sunawan to be held on trust for the second defendant. For such purpose a trust deed and nominee agreement were executed by the second defendant and Mohd Sunawan on 23 February 2012;

G (g) as such on 1 November 2011 the first defendant had issued share capital of 100,000 ordinary shares where the second defendant held 30,000 shares and the fifth defendant held 70,000 shares. The 70,000 ordinary shares held by the fifth defendant consists of:

H (i) 50,000 ordinary shares held on trust for the benefit of TCK (TCK's shares); and

I (ii) 20,000 ordinary shares held on trust for the benefit of the second defendant;

(h) TCK was adjudged bankrupt on 15 August 2012 by the High Court of Malaya in Johor Bharu;

(i) on 15 April 2013 Mohd Sunawan as a trustee of TCK and the fifth defendant:

(i) transferred the TCK's shares he held on trust for TCK to the fifth defendant who holds the TCK's shares for the benefit of TCK; and

(ii) transferred the 20,000 ordinary shares held on trust for the second defendant to the fifth defendant.

On even date Mohd Sunawan resigned as director of the first defendant and was replaced with the fifth defendant;

(j) on 29 October 2014 the plaintiff was appointed as director of the first defendant;

(k) on 4 September 2016 a deed of trust, declaration of trust and a power of attorney were executed between the plaintiff and the fifth defendant where the fifth defendant purportedly declared a trust of the TCK's shares for the benefit of the plaintiff;

(l) on 21 October 2016:

(i) the fifth defendant transferred 20,000 ordinary shares of RM1 each held in trust for the second defendant to the third and the fourth defendants for a consideration of RM20,000; and

(ii) the third and fourth defendants were appointed as directors of the first defendant at an extraordinary general meeting held on 21 October 2016;

(m) on 28 March 2017 the plaintiff was removed as a director of the first defendant pursuant to an EGM held on 28 March 2017; and

(n) on 23 May 2017 the fifth defendant resigned as director of the first defendant. Subsequently the fifth defendant transferred the TCK's shares to the sixth defendant on 1 June 2016.

[17] A summary of the fifth defendant's facts is as follows:

(a) the founders of the first defendant were TCK and the second defendant. The issued and paid up share capital of the first defendant were then RM2 and TCK and the second defendant each held RM1 ordinary share;

(b) in 2011 TCK was facing bankruptcy and to avoid the consequences of bankruptcy TCK transferred, on 26 January 2011, his one ordinary shares of RM1 each in the first defendant to Mohd Sunawan. The shares was to be held by the Mohd Sunawan for the benefit of TCK. On the same date Mohd Sunawan was appointed director of the first defendant. TCK resigned as director of the first defendant on the same date;

(c) in order to increase Bumiputera participation in the first defendant, pursuant to a members resolution in writing on 3 May 2011, the issue

and paid up share capital of the first defendant was increased from RM2 to RM100,000 by the allotment and issue of 98,999 ordinary shares of RM1 each. Pursuant to the increase, Mohd Sunawan held 49,999 ordinary shares on behalf of TCK and the second defendant held 49,999 ordinary shares;

(d) then to further strengthen the participation of Bumiputera, on 1 November 2011, it was agreed between TCK and the second defendant that the second defendant transfer his 20,000 ordinary share of RM1 each to Mohd Sunawan for a consideration of RM20,000. This is for the purpose of enhancing the first defendant competitive edge in bidding for specific projects;

(e) accordingly as at 1 November 2011 the shareholding of Mohd Sunawan was as follows:

(i) 50,000 ordinary shares of RM1 each were held on trust for TCK; and

(ii) 20,000 ordinary shares of RM1 each were held on trust for the second defendant;

(f) Mohd Sunawan resigned as director of the first defendant on 15 April 2013 and on the same day the fifth defendant was appointed as director of the first defendant;

(g) subsequently on 22 April 2013, at the request of TCK (after he was adjudged bankrupt on 15 August 2012) and the second defendant, Mohd Sunawan transferred his 70,000 ordinary shares of RM1 each to the fifth defendant who is to hold 50,000 ordinary shares on trust for TCK and 20,000 ordinary shares on trust for the second defendant;

(h) at the request of TCK, the plaintiff was appointed director of the first defendant on 29 October 2014;

(i) around 21 October 2016 the fifth defendant transferred 20,000 ordinary shares of RM1 each (which the fifth defendant was holding on trust for the second defendant) to the second defendant and the third defendant for a total consideration of RM20,000. The fifth defendant resigned as director of the first defendant on 25 May 2017; and

(j) the fifth defendant subsequently transferred the 50,000 ordinary shares (which the fifth defendant held on behalf of the fifth defendant) to the sixth defendant on 1 June 2017. The 50,000 shares is to be held by the sixth defendant on behalf of the fifth defendant.

Enclosure 10 — The fifth defendant to strike out the amended OS

[18] The fifth defendant contends the plaintiff's originating summons is scandalous, frivolous and vexatious or may prejudice, embarrass or delay the fair trial of the action and an abuse of the process of the court on the following grounds:

(a) the plaintiff was never a registered shareholder of the first defendant and nor was the plaintiff the beneficial owner of the TCK's shares. As such the plaintiff lack the necessary locus to commence this proceedings against the fifth defendant;

(b) the plaintiff cannot assert ownership over the TCK's shares which purportedly belongs to his father TCK who was adjudged a bankrupt since 15 August 2012; and

(c) the plaintiff's claim is founded on a transaction which on the face of it may be seen as lawful but entered into for an unlawful purpose or to achieve an unlawful end. The true intention of the agreements executed by the fifth defendant in favour of the plaintiff, namely, the power of attorney, the deed of trust and declaration of trusts was to create an 'Ali Baba' type of company where control of the first defendant company was still vested in the hands on non-bumiputera are illegal as it is against public policy and this violate s 24(e) of the Contracts Act 1950 and therefore unlawful.

Enclosure 14 — The first to the fourth defendants' application to strike out the amended OS

[19] The first to the fourth defendants submits the plaintiff was not and is still not at any material time the beneficial owner of TCK's shares. This is due to the fact the TCK was adjudged a bankrupt on 15 August 2012.

[20] It is the first to the fourth defendants' contentions that pursuant to the adjudication order against TCK:

(a) TCK and his trustee Mohd Sunawan had lost title over TCK's shares and therefore neither TCK nor Sunawan had the right to transfer TCK's shares to the fifth defendant to purportedly hold the shares on trust for the benefit of TCK. Accordingly the fifth defendant did not have the right to declare a trust of TCK's shares for the benefit of the plaintiff;

(b) as the fifth defendant has no right to hold TCK's shares for the benefit of the plaintiff, the fifth defendant did not have the right to execute the trust documents, namely, deed of trust, the declaration of trust and the power of attorney; and

(c) the fifth defendant has no capacity to transfer TCK's shares to the sixth defendant.

The plaintiff's contentions

[21] At the outset, the plaintiff challenges the second defendant's legal capacity to affirm affidavits on behalf of the first, third and fourth defendants. This is because there is no proof of the first defendant's resolution authorising the second defendant to affirm affidavits on behalf of the first defendant. Neither was there any affidavit filed by the third and fourth defendant affirming that they have authorised the second defendant to affirm affidavits on their behalf.

[22] It would be extremely prejudicial to the plaintiff if the amended OS is strike out without hearing the sixth defendant in respect of the transfer and ownership of the TCK's shares to her from the fifth defendant who holds the shares for the benefit of the plaintiff.

[23] The plaintiff contends there are material issues of conflicting affidavit evidence amongst the parties. As such the court ought to invoke its jurisdiction under O 28 r 8 of the RoC 2012 directing this proceedings to be begun by writ.

THE LAW

[24] The amended OS is premised on s 346 of the Companies Act 2016 which provides as follows:

346 Remedy in cases of an oppression

(1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

(2) If on such application the Court is of the opinion that either of those grounds is established, the Court may make such order as the Court thinks

fit with the view to bringing to an end or remedying the matters complained of, and without prejudice to the generality of subsection (1), the order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in the future;

(c) provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself;

(d) in the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company; or

(e) provide that the company be wound up.

(3) If an order that the company be wound up is made under paragraph (2)(e), the provisions of this Act relating to winding up of a company shall apply as if the order had been made upon a petition duly presented to the Court by the company, with such adaptations as are necessary.

(4) If an order under this section makes any alteration in or addition to any constitution, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the constitution inconsistent with the order, but subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days from the making of the order.

(6) The applicant who contravenes subsection (5) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and, in the case of a continuing offence, to a further fine of five hundred ringgit for each day during which the offence continues after conviction.

[25] The term 'member' is defined under s 2 of the CA 2016 and it reads:

2 Interpretation

(1) In this Act, unless the context otherwise requires —

'member' means —

(a) in the case of a company limited by shares, a person whose name is entered in the register of members as the holder for the time being of one or more shares in the company; or

(b) in the case of a company limited by guarantee, a person whose name is entered in the register of members

[26] Enclosures 10 and 14 are made pursuant to O 18 r 19 of the Rules of Court 2012 which states:

> 19 Striking out pleadings and endorsements (O 18 r 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under subparagraph (1)(a).
>
> (3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[27] It is trite law that only in plain and obvious cases can the court exercise its power to strike out a case under any of the four limbs of O 18 r 19 and therefore such power should be exercised sparingly (*Bandar Builders Sdn Bhd 2 Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; *Solai Realty Sdn Bhd v United Overseas Bank (M) Bhd* [2013] 4 MLJ 545).

[28] It is for the first to the fifth defendants to prove that their application comes within any of the four limbs of O 18 r 19 of the RoC 2012 (*Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192).

FINDINGS OF THE COURT

Preliminary objection

[29] In respect of the preliminary objection raised by the plaintiff as to the second defendant's authority to affirm the affidavits on behalf of the first, third and fourth defendants, I have perused the affidavits affirmed by the second defendant on behalf of the first, third and fourth defendants and I am satisfied that the second defendant is fully and duly authorised to affirm the affidavits for and on behalf of the first, third and fourth defendants.

[30] There are five affidavits affirmed by the second defendant on behalf of the first, third and fourth defendants and used for the purpose of encl 14, namely:

(a) the first to the fourth defendants' affidavit No 1 — encl 16;

(b) the first to the fourth defendants' affidavit No 2 — encl 17;

(c) the first to the fourth defendants' affidavit No 3 — encl 18;

(d) the first to the fourth defendants' affidavit No 4 — encl 20; and

(e) the first to the fourth defendants' affidavit No 5 — encl 45.

The above affidavits are collectively referred to as 'the first to the fourth defendants' affidavits'

[31] Close scrutiny of the first to the fourth defendants' affidavits shows that the second defendant has averred that he was duly authorised by the first, third and fourth defendants to affirm the affidavits on their behalves. This can be seen at para 1 of the first to the fourth defendants' affidavits. The second defendant also averred that the facts deposed in the affidavit are within his personal knowledge derived from the records of the first to the fourth defendants to which he has access.

[32] Besides that, the second defendant has specifically identified the plaintiff's affidavits which he was duly authorised by the first, third and fourth defendants to reply. This can be seen at para 3 of encl 16, para 3 of encl 17 and para 3 of encl 45. In the first to the fourth defendants' affidavit encl 16, besides general authorisation given to him, the second defendant has specifically stated the authorisation given by the first, third and fourth defendants to him to affirm the affidavit to oppose the OS and to reply to the plaintiff's affidavit in support of the OS. In the first to the fourth defendants' affidavit encl 20, besides averring the general authorisation given to him, the second defendant has also specifically stated the authorisation given by the first, third and fourth defendants to him to affirm the affidavit to support the first to the fourth defendants' application for fortification in encl 5.

[33] To my mind the fact that the second defendant was one of the two first directors of the first defendant from its inception in 2010 and is still one of the present director of the first defendant explain the justification for the first, third and fourth defendants' decision to authorise the second defendant to affirm the affidavits for and on behalf of them in this proceedings. Under the circumstances, it would be for the first, third and fourth defendant to question the second defendant's authority or lack of it and not the plaintiff (*Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311 (HC)).

Merits of encls 10 and 14

[34] It is apparent from the facts stated in the parties' various affidavits, that the plaintiff's action against the first to the fifth defendants under s 346 of the CA 2016 is premised on the allegation that the plaintiff is the beneficial owner of the TCK's shares which was held by the fifth defendant on trust for the plaintiff's benefit.

[35] It is not a disputed fact that the plaintiff was never ever a registered shareholder of the first defendant. As such, going by the definition of the term 'member' in the CA 2016, the plaintiff's amended OS is clearly unsustainable.

[36] However the plaintiff claims all is not lost as the plaintiff's case comes within the exception established in the case of *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113; [1996] 4 CLJ 716 (FC). It is the plaintiff's case that the case of *Owen Sim Liang Khui* recognised the rights of a beneficial shareholder to initiate an oppression action against the wrongdoers.

[37] The plaintiff also contends based on the principle of estoppel as stated in the case of *Owen Sim Liang Khui,* it is therefore unjust or inequitable to permit the defendants to an oppression action to assert or to contend that the plaintiff has no locus standi to move the court.

[38] The plaintiff relies on the following passages extracted from the judgment of the Federal Court:

> A reading of s 181 reveals that in the latter part of para (a) of sub-s (1) to that section the Legislature has used the expression 'members, shareholders ... of the company'. However, it does not require much intellectual exercise to realise that the sub-section, read as a whole, when using the terms 'member' and 'shareholder', refers to the same category of persons within the company.
>
> The result, therefore, is that, as a general rule, only one who comes within the terms of s 16(6) of the Act may present a petition under s 181. Put another way, in general, a petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition: if he is unable to do so, then he has no standing to invoke the jurisdiction conferred upon the court by the section.
>
> In this respect, the section differs materially from s 459 of the Companies Act 1985 of the United Kingdom, for under the latter provision past members have been expressly given locus standi to apply for relief under it.
>
> We have, in stating the applicable rule as to standing under s 181 taken great care in emphasising that what has been expressed is the general rule and not a universal rule.

We have done so to bring home the point that there may be cases where an application of the general rule would be unfair or unjust.

Take, for instance, the case of a person who has agreed to become a member, but whose name has been omitted from the register of members.

If it transpires that prior to the dispute leading to the presentation of the petition, a company or its board had always treated the complainant as a member, it would not be open to them to assert that the petitioner lacked locus standi. Examples may be multiplied without any principle emerging from them.

Take the facts of this very case.

Here we have a fact pattern where the appellant's membership of the company had been terminated in circumstances which are being challenged by him on substantial grounds.

The substantial ground he complains of is the deprivation of his membership in the company.

He says that the circumstances attending this deprivation of membership falls within the framework of s 181(1)(a) and (b). It is the company, acting through its board, that had deprived the appellant of the status of a member.

Can the company be now heard to say that the appellant is no longer a member and is therefore disentitled from moving the court under s 181 of the Act and from questioning that very deprivation in proceedings brought under the section? We think not.

For it does not lie in the mouth of the alleged wrongdoers to say that the appellant has no ground to stand on after having cut the very ground from under his feet.

The true principle which governs such cases as the present is housed in the doctrine of estoppel.

The doctrine has reached a stage where it may be applied to prevent or preclude a litigant from raising the provisions of a statute in answer to a claim made against him in circumstances where it would be unjust or inequitable to permit him so to do.

The leading authority on the application of the doctrine to prevent reliance upon a statute is *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443; [1992] 1 LNS 7, at pp 244–5. There, Edgar Joseph Jr J (as he then was), in an illuminating judgment, held a defendant who had been guilty of unconscionable and inequitable conduct to be debarred from relying upon the provisions of the Limitation Act 1953.

The doctrine has been held to be capable of conferring rights upon a litigant by precluding his opponent from challenging title.

See *West v Pollack & Freemantle* [1937] TPD (SA) 64.

Additionally, the wide variety of circumstances in which the doctrine of estoppel operates in the field of private law was recently considered in a judgment of this court in *Boustead Trading [1985] Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*

[1995] 3 MLJ 331; [1995] 4 CLJ 283.

The equitable jurisdiction by which a personal bar is placed upon a litigant from raising or relying upon the provisions of a statute is also contained in the maxim 'equity will not permit statute to be used as an engine of fraud'. In *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291; [1985] CLJ Rep 266, at p 296, Mohamed Azmi SCJ described the nature and scope of the maxim in clarity of language that merits recollection:

> It is not a (sic) fraud in the common law sense, but an unmeritorious and unconscionable conduct which is known as constructive or equitable fraud (see *Spry on Equitable Remedies*, 2nd Ed, p 236).
>
> In its early history, the maxim was used to prevent litigants from raising or relying upon the Statute of Uses, the Statute of Wills and the Statute of Frauds.
>
> In modern times it has been used to prevent a litigant from relying upon a provision in the United Kingdom Law of Property Act 1925 (see, *Bannister v Bannister* [1948] 2 All ER 133) and more recently in the context of defeating title under the Torrens System (see, *Bahr & Anor v Nicolay & Ors (No 2)* [1987] 164 CLR 604). The category or class of statutes to which the maxim may be applied are not closed and its development, like much of equity jurisprudence, falls to be dealt with on a case by case basis, taking into account policy considerations that may govern a particular statutory provision.

It may therefore be quite safely stated that if facts emerge from which it may be determined that it is unjust or inequitable to permit a respondent to a petition under s 181 to assert or to contend that a petitioner has no locus standi to move the court, then, he will be estopped from so asserting.

Stated in another fashion, a respondent who is guilty of unconscionable or inequitable conduct will not be permitted to raise or rely upon the requirement of membership in order to defeat a petitioner's standing as this would amount to his using statute as an engine of fraud.

It does not matter how the proposition is formulated so long it has the effect adverted to.

We have earlier made our observations upon the conduct of the company which by its own action had deprived the petitioner of membership and had then asserted his lack of standing to move a petition under s 181. This conduct does not, in our judgment, entitle the company (for it was the one who raised the issue) from asserting that the appellant lacks standing to present the petition.

It matters not that it is the petitioner who relies upon the estoppel.

For the true nature of the doctrine is not that it may not be used to found a cause of action, but that it may be invoked to prevent the respondents from asserting the existence or non-existence of facts, the existence or non-existence of which would destroy a cause of action.

Unfortunately, the learned judge in the present case did not address his mind to the wider concepts that were applicable to the facts before him.

Instead, he approached the case along narrow lines, causing him to fall into error and to misstate the relevant law.

His finding, the effect of which was that the appellant lacked standing, was based upon a misunderstanding of s 181 of the Act.

To summarise, the learned Judge was wrong in his approach to the procedural point; he was wrong in his interpretation of the term 'oppression' appearing in para. (a) to sub-section (1) of section 181 and in its application to the facts of the instant case; he was wrong in requiring an express plea of mismanagement or unfairness, and he was wrong in denying the appellant standing to present the petition.

[39] Having considered the case of *Owen Sim Liang Khui*, I am of the view it is not open for the plaintiff to rely on that case to support his action against the defendants. My reasons are stated below.

[40] The complainant/appellant in the *Owen Sim Liang Khui* case was at all material time a registered shareholder of the company. The complainant/appellant's shares was forfeited by the majority members in control of the company and the value of the shares forfeited was utilised to set off the loan which is alleged to be owing by the complainant/appellant to the company. In the instant case the plaintiff admitted that he was never registered as a shareholder of the first defendant.

[41] The oppressive conduct which forms the basis of the complaint in the case of *Owen Sim Liang Khui* is the conduct of the majority shareholders who has adversely deprived the complainant of the ownership of the shares which was once registered in his name. Since it was the respondent who deprived the complainant/appellant of the status of a member the court therefore ruled it is unjust or inequitable to allow the respondent to assert or to contend that the complainant/appellant has no locus standi to move the court. In the instant case, since the plaintiff was never registered as a shareholder of the first defendant company, there is simply no issue of the first to the fifth defendants depriving the plaintiff of his status as a member of the first defendant.

[42] Based on the facts of the case of *Owen Sim Liang Khui*, there was never any issue raised in respect of the ownership of the complainant/appellant over the 1,500 shares he holds in the company. The issue between the complainant/appellant and the majority shareholders is the sum of RM111,734.60 allegedly owed by the complainant/appellant to the company and the oppressive conduct of the majority members of the company in dealing with the matter including forfeiting the shares of the complainant/appellant's despite the objection by the complainant/appellant. In the instant case, the plaintiff's ownership over the TCK's shares is vigorously challenged and this inevitably brings about the issue of locus standi of the plaintiff.

Transfer of the TCK's shares in the first defendant

[43] By the plaintiff's own averment, the TCK's shares were transferred by TCK in 2013 to the fifth defendant and the said shares is intended to be held by the fifth defendant for the benefit of TCK. Based on exh TCH9 encl 16 and exh ABS1 encl 13, when the 50,000 shares were transferred by TCK to the fifth defendant, adjudication and receiving order had already been made against TCK. As a result of the said orders, the plaintiff claim he is the beneficial owner of the 50,000 shares held by the fifth defendant on trust for the benefit of TCK. This is evident from the trust documents (exh DT5 encl 2 and exh TCH11 encl 18) executed between the plaintiff and the fifth defendant.

[44] However based on the affidavit evidence of the first to the fourth defendants and the fifth defendant, it would appear the transfer of TCK's shares had taken place much earlier, that is, in 2011. Based on exh TCH3 encl 18 and exh ABS1 encl 13, TCK had transferred his one share in the first defendant to Mohd Sunawan (to be held on trust for the benefit of TCK) on 26 January 2011.

[45] It is abundantly clear when TCK disposed of his one share in the first defendant to Mohd Sunawan on 26 January 2011, the suit against TCK is hanging over his head. Summary judgment was entered against him on 10 May 2011 and eventually he was adjudged bankrupt on 15 August 2012. This facts are all supported by contemporaneous evidence produced and exhed in the affidavits of the first to the fifth defendants. Simply put, a bankruptcy proceedings was imminent when TCK transferred his one share to Mohd Sunawan.

[46] To my mind the transfer of TCK's one shares in so far as it took place within two years prior to TCK being adjudged bankrupt certainly trigger s 52 of the IA 1967 which states as follows:

> 52 Avoidance of voluntary settlement
>
> (1) Any settlement of property, not being a settlement made before and in consideration of marriage or a settlement made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the Director General of Insolvency , and shall, if the settlor becomes bankrupt at any subsequent time within five years after the date of the settlement, be void against the Director General of Insolvency , unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and

that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. A

(2) Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt, before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the Director General of Insolvency. B

(3) For the purposes of this section 'settlement' includes any conveyance or transfer of property, bill, bond, note, security for money or covenant for the payment of money and any gift of money. C

(4) For the purposes of this section a settlor who dies insolvent shall be deemed to have become bankrupt at the date of his death. D

[47] The Federal Court in *Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd* [2016] 5 MLJ 1; [2016] 7 CLJ 823 dealt with the operation of s 52 of the IA 1967 in light of s 293 of the CA 1965 (undue preference). The apex court made the following observations: E

[31] Section 52 of the BA talks about a settlement (which includes conveyance or transfer) of property, inter alia, to 'a purchaser ... good faith' ... In order to constitute a purchaser in good faith within the meaning of the Bankruptcy Act 1967, it is sufficient if the purchaser acts in good faith and it is not necessary that both parties to the transaction should so act (see also: *Official Assignee v Ngu Ung Yong* [1988] 2 MLJ 264; [1987] 1 LNS 56; *Hauce v Harding* [1888] 20 QBD 732; and *Mackintosh v Pogose* [1895] 1 Ch 505). F

[32] The words 'undue preference' as appeared in the title of the section in the context of s 293 of the CA read together with s 52 of the BA, as far as relevant to the facts of the present case, refer to an act of preference by a company which is in the run up to be wound up during the twilight period of two years, in disposing or transferring its properties to any person or entity (though not bona fide purchaser) and without valuable consideration, the effect of which be detrimental to the interest of the general creditors (particularly unsecured creditors) in the process of liquidation in the event of it being wound up by court. G

[33] A transfer or conveyance made during the twilight period either not in good faith or without valuable consideration is absolutely void as against the liquidator. If the liquidator is able to show that either valuable consideration or good faith on the part of the purchaser (in this case is the defendant) is lacking, he has discharged the onus of proving that the transfer or conveyance is void (see: *Re Anson Cycle & Motor Works; Ex parte the Official Assignee* [1960] MLJ 171; [1960] 1 LNS 104; *Official Assignee of the Estate of Cheah Soo Tuan v Khoo Saw Cheow* [1931] 2 MC 126; [1931] AC 67 (PC)) ... H I

[34] The primary purpose of s 52 of the BA is that it was framed to prevent properties belonging to the person (in bankruptcy) or company (in winding up)

A from being put into the hands of relatives or preferred parties during the twilight period to the disadvantage of creditors, in the event the person is declared bankrupt or the company is wound up later (see: *Re A Debtor; Ex parte Official Receiver v Morrison* [1965] 1 WLR 1498; and *Barton v Official Receiver* [1986] & AC LC 533). However as clearly stated by Chong Siew Fai J, in *Official Assignee v Ngu Ung Yong*:

B

> That may well be so. But each case must be considered in its own facts and circumstances, and whether a settlement of property in a case falls foul of the statutory provisions must necessarily depend on the facts and circumstances of that particular case ...

C

[48] Based on the case of *Silver Corridor*, whether the transfer of the one TCK's share in the first defendant to Mohd Sunawan was made in good faith or for valuable consideration would necessarily depend on the facts and circumstances. To my mind, based on the affidavits evidence adduced, it can be reasonably inferred that the transfer was not done in good faith. It was done to circumvent s 52 of the IA 1967 so that in the event TCK is adjudged bankrupt TCK's shares would not be passed to the DGI who is empowered to receive, manage and realise TCK's assets for the benefit of TCK's creditors. As the transfer is void against the DGI, it follows the agreement between TCK and Mohd Sunawan for Mohd Sunawan to hold the one shares in trust for the benefit of TCK is void. Therefore, like night follows day, Mohd Sunawan does not possess the legal capacity and good title to deal with the one share.

D

E

F **[49]** Accordingly Mohd Sunawan does not has good title over the TCK's shares (consists of the initial one) share and the 49,999 ordinary shares which was issued to him by the first defendant on 3 May 2011 and held on trust for TCK — see exh TCH6 encl 18 and exh ABS3 encl 13) to transfer it to the fifth defendant which he subsequently held on trust for TCK including transferring the shares which he held on trust for TCK to others.

G

[50] In this respect it is pertinent to note the contemporaneous evidence and by the plaintiff's own averment (paras 13–14 of encl 2), it is not disputed that the transfer of the TCK's shares by Mohd Sunawan to the fifth defendant took place on 15 April 2013 which was after TCK was adjudged bankrupt on 15 August 2012. The fifth defendant then executed the trust documents where the fifth defendant declared he holds 70,000 ordinary shares of RM1 each in the first defendant in trust for the plaintiff.

H

I **[51]** The plaintiff relies on the trust documents and claim he is the beneficial owner of the TCK's shares in the first defendant, which he claims entitle him to initiate this oppressive action under s 346 of the CA 2016 because of the oppressive conduct on the part of the first to the fifth defendants as set out in para 9 above.

[52] It is pertinent to note that the transfer of the TCK's shares to the fifth defendant in 2013 was done after TCK was adjudged bankrupt in 2012.

[53] Pursuant to s 24 read with s 8 of the Insolvency Act 1967 ('the IA 1967'), upon TCK adjudged bankrupt on 15 August 2012, all TCK's properties including the TCK's shares are vested in the Director General of Insolvency who is also the receiver of all TCK's properties. By virtue of s 58 of the IA 1967, the properties of TCK is passed to the DGI without any conveyance, assignment or transfer. In *Tong Soon Tiong & Ors v FA Securities Sdn Bhd* [2016] 6 MLJevi 165; [2013] 2 CLJ 448 the Federal Court said as follows:

> [11] When a debtor is adjudicated a bankrupt his property vests in the DGI immediately and with that property being divisible among his creditors. No conveyance, assignment or transfer is required for the bankrupt's property to vest in the DGI who now acts as the trustee of the creditors. Thenceforth the bankrupt will be subject to certain statutory restrictions and responsibilities, amongst them to give an account of all his monies and property to the DGI every six months, handing over to the DGI any unexpanded funds, informing him of any change of address, and the like. In a gist the bankrupt is not as free as an unadjudicated person ...

[54] Since TCK's properties are vested with the DGI upon him being adjudged a bankrupt, TCK has no title and right over the TCK's shares in the first defendant. It follows that he has no legal capacity to transfer the TCK's shares to Mohd Sunawan in 2013. This is in accordance with the principle *nemo dat quod non habet* where no one can give what he does not have. This is stated in *Md Hilmi bin Md Noor & Anor (suing in their personal capacities and as administrators for the deceased, Md Noor bin Mohamed) v Azman bin Ahmad & Ors* [2016] 6 MLJ 205; [2016] 6 MLRA 39:

> [34] ... This clearly is an exception to the nemo dat quod non habet principle, which literally means that no one can give what he does not have. Under the English common law, it is quite simply stated that no one can give a better title than what he himself possesses. Much less, if he has none to begin with ...

[55] As TKC has no good title over the 50,000 shares to pass to Mohd Sunawan it follows the dealings or transactions carried out in respect of the TCK's shares by TCK and the transactions thereafter is of no effect, null and void. Pursuant to s 24 of the Contacts Act 1950 the trust documents executed by the plaintiff and the fifth defendant is unlawful and void as it was clearly in violation of the BA 1967.

[56] As such the plaintiff cannot rely on the trust documents to acquire beneficiary title/ownership over the TCK's shares in the first defendant so as to enable him to initiate this oppressive proceedings under s 346 of the CA 2016.

To allow the plaintiff to assert ownership over the TCK's shares would tantamount to lending a hand to the plaintiff to violate and defeat the IA 1967 which is simply against public policy. In *VVO Construction Sdn Bhd v Bina MYK Sdn Bhd and another case* [2017] MLJU 79 it was held by the learned judge that no cause of action can be based on an illegal contract or that one's action in law cannot be for furthering an illegal purpose or having the effect of defeating the law.

[57] It is the plaintiff's contention that there is conflict of evidence in the various affidavits filed by the parties and therefore this is not a plain and obvious case to be determined summarily. Having combed through the various affidavits, I am of the view in so far as the beneficial ownership of the TCK's shares is concerned, there is no conflict of evidence. To my mind the conflict of evidence alleged by the plaintiff is not real and substantive as to warrant oral evidence be adduced in order to verify the truth of the facts in relation to the plaintiff's ownership over the TCK's shares. This is because the issue of ownership of the TCK's shares can be adequately determined through the undisputed contemporary evidence adduced in the affidavit evidence (*Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah Sdn Bhd) & Ors* [1996] 1 MLJ 309).

[58] TCK's action and conduct was a blatant violation of the Insolvency Act 1967. The reasonable inference to be drawn from the transfer of the initial one share in the first defendant to Mohd Sunawan is TCK's intention to siphon the said share from the DGI and save it for the plaintiff (TCK's son) who in 2011 has yet to possess the legal capacity to hold properties. Besides that, it is apparent from the plaintiff's own admission (para 8 encl 2) TCK is conducting business through the plaintiff who manages TCK's business in Johor. This is another instant of violation of the bankruptcy law as a bankrupt is not allowed to carry on any business except with the prior permission of the DGI (s 38 of the IA 1967).

[59] As stated above, the crucial undisputed fact which is gathered from the contemporaneous evidence and on top of it all, from the plaintiff's own admission, is that TCK had transferred the TCK's Shares in the first defendant after he was adjudged a bankrupt. In accordance with the principle *nemo dat quod non habet* TCK has no good title to transfer the one initial share to Mohd Sunawan. Mohd Sunawan in turn has no good title to transfer the TCK's shares to the fifth defendant who in turn has no good title to transfer the TCK's Shares to the sixth defendant. In this respect I am incline to agree with learned counsel for the first to the fourth defendants that no amount of oral evidence in trial would alter the said crucial facts.

CONCLUSION

[60] Since the plaintiff's action is premised on s 346 of the CA 2016, the crucial issue to be determined here is the plaintiff's status and standing as a member of the first defendant. This is because the complaint mounted by plaintiff is in relation to the affairs of the first defendant and/or the powers of the directors of the first defendant which is alleged to be oppressive or in disregard of the plaintiff's interest as a member of the first defendant or unfairly discriminates or is otherwise prejudicial to the plaintiff as a member of the first defendant.

[61] It is an undisputed fact that the plaintiff is not and was never ever a registered member of the first defendant in the context of the definition of the term 'member' as stated in s 2 of the CA 2016. On the facts, the plaintiff is not entitle to seek refuge under the exception to the statutory requirement under the said s 346 which is set out in the *Owen Sim Liang Khui*'s case. As such the plaintiff has no locus to commence this oppressive action under s 346 of the CA 2016 and it is therefore plain and obvious that the plaintiff's action under s 346 is unsustainable. I accordingly allowed the applications to strike out encls 14 and 15 with costs.

[62] In view of the fact that the TCK's shares are shares vested in the DGI, it is only appropriate and just for this court to exercise its inherent powers and make a consequential order for the sixth defendant to transfer the said TCK's shares to the DGI. I accordingly ordered the sixth defendant to transfer the TCK's shares to the DGI within two weeks from the fair copy of the order in respect of encls 10 and 14 is extracted.

Enclosures 10 and 14 allowed; encls 15, 24 and 31 struck out.

Reported by Mohd Kamarul Anwar